NO. 36, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

THE STATE OF TEXAS,
Plaintiff

v.

THE STATE OF LOUISIANA,
Defendant

BEFORE THE HONORABLE
ROBERT VAN PELT, SPECIAL MASTER,
ON PLAINTIFF'S MOTION FOR JUDGMENT

PLAINTIFF'S REPLY BRIEF

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney
General of Texas

HOUGHTON BROWNLEE, JR.
J. ARTHUR SANDLIN
JAMES H. QUICK
Assistant Attorneys General
of Texas

PRICE DANIEL
Special Assistant Attorney
General of Texas

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INTRODUCTORY STATEMENT

In the Reply Brief filed by the State of Louisiana, Defendant attacks the affirmative case set forth in Part I of Plaintiff's Brief in Support of the Motion for Judgment, using a subject title outline rather than specifically countering the points in the order presented in the Texas brief. However, the Louisiana brief adequately and appropriately narrows the basic issue in this case to whether the western half of Sabine Pass, Sabine Lake and Sabine River belonged to the United States or to the State of Louisiana on July 5, 1848, when Congress gave consent for the State of Texas to extend its eastern boundary so as to include such area.

If it is concluded as a matter of law that the western half of the Sabine was owned by and subject to the exclusive jurisdiction of the United States on that date, this will dispose of all of Louisiana's additional and alternative defenses including the question of whether the boundary is in the geographic or thalweg middle of the streams.

Since the Louisiana brief does not contain any argument that the Master should hear witnesses before making his findings, it is assumed that Defendant has abandoned its former contention in this regard and that the issues are ripe for determination on Plaintiff's Motion for Judgment.

In this brief Plaintiff will state its points and present its rebuttal in the same sequence that Defendant has made its arguments, separating and preceding the points with the subject title used in the Louisiana brief. However, at the outset, Plaintiff will reply to some of the general contentions and inferences made in the Louisiana brief with reference to the area included in this controversy as distinguished from the area not so included.

AREA INCLUDED IN THIS CONTROVERSY

For convenience and in order to avoid repetition, both parties have made it clear that their general use of the term "Sabine River" includes Sabine Pass and Sabine Lake. However, in its repeated references to the narrow width of the area in controversy, Louisiana has completely ignored Sabine Pass, which has an average width of 3600 feet, and Sabine Lake, which has an average width of 34,000 feet in the major portion of its 20-mile length. At least six times Louisiana refers to the area in controversy as only "a 150-foot strip of water." (See Louisiana's Reply Brief, 3, 13,

15, 16, 24 and 44). Apparently, the reason for minimizing the width of the area is to support Defendant's contention that the United States could not have intended to retain title and jurisdiction over such "a slender strip of water." (Def. Br. 13) Actually, the greater area in controversy is in the western half of Sabine Lake, which comprises 30,727 acres, as compared with 4,000 acres in the western half of the River, and 1010 acres in the western half of the Pass. See affidavit of R. C. Wisdom, Director of the Surveying Division, General Land Office of Texas, filed herewith as Item 1 in Plaintiff's rebuttal Exhibit G.

Thus, the western half of Sabine Lake, a wide and extensive body of shallow water averaging 2 to 8 feet in depth, covers over 6/7ths of the submerged land involved in this case. It would have been reasonable for Congress to have assumed in 1812 and 1849 that submerged lands along the shore could be reclaimed in the manner that has in fact since occurred. Plaintiff's original brief, 44-45, and Exhibit A, 46-47, Exhibit B, 69-75, and Exhibit E, 68-9, show that, under grant from the State of Texas, the City of Port Arthur has reclaimed and built by land-fills an 18-mile island comprising more than 3,000 acres of land that were formerly submerged by the waters of Sabine Lake; that the City, Jefferson County, Texas, and the United States Government have spent large sums of money in the construction of roads and bridges to and on this island; and that it now contains a golf course, marina, stadium, and the local headquarters buildings for the U. S. Corps of Engineers, the U. S. Army Reserve Training Center, and the U. S. Navy and Marine Reserve Training Center, all under grants or leases from the State of Texas or the City of Port Arthur. These exhibits also show that by agreement with the U. S.

Corps of Engineers another 5,000 acres are being reclaimed by the dredging of land-fills in the western half of Sabine Lake, and the levees for these fills are shown in the picture of Pleasure Island opposite p. 45 of Plaintiff's main brief.[1] See also Item 2 of Plaintiff's Exhibit G filed herewith.

Obviously, more than water was involved when this boundary was fixed in the geographic middle of Sabine River. The submerged lands beneath navigable waters within the territories of the United States were originally held in trust for future states, and the title to such submerged lands within the boundaries of a state became vested in the state as an incident of state sovereignty. *Pollard's Lessee v. Hagan,* 3 Howard 212 (1845). See Texas' main brief, 35-36, for further discussion of this point. It is apparent that except for the value of the land and minerals beneath these waters Louisiana probably would have continued to recognize without question that its boundary included only the eastern half of the Sabine, as it did from 1812 to at least 1941.

AREA NOT IN CONTROVERSY

It was thought that the land boundary line north of the Sabine had been eliminated from this controversy by the stipulation in which it was agreed that the eastern land boundary of Texas is as it was established on the ground in 1841 by the Joint Commission appointed by the United States and the Republic of Texas. However, Louisiana devotes much of its brief

[1]All citations to pages in Plaintiff's original Brief in Support of Motion for Judgment refer to the reprinted copy of this brief filed in compliance with type sizes required by the Rules of the Supreme Court. The brief is also referred to herein as Plaintiff's "main brief" and in abbreviation as "Plf.Br.".

and all of its Exhibit G to this boundary and its ownership of the land adjacent thereto.

If this 1841 line was actually run north from a true "west" bank (instead of a southwest bank) of the Sabine, it would of course be slightly west of a parallel line commencing in the geographic middle of the River and would have resulted in a long narrow strip of Federal land between these parallel lines. Plaintiff's position throughout this case has been that if any such theoretical strip ever existed, jurisdiction and ownership of it was a matter between the United States and Louisiana, and in no event is it claimed by Texas.[2]

In an obvious attempt to establish a premise from which to argue its claim to the western half of the Sabine, Louisiana now embraces the theory that such a Federal strip once existed north of the Sabine and that Louisiana acquired it by reason of the Treaty of 1819. The Louisiana brief, 16, says: "She got it—and this is our basic contention—through the medium of the Adams-de Onis Treaty of 1819," and continues "It follows logically that, if Louisiana was the beneficiary of this narrow 150-foot wide land strip under the aegis of the Adams-de Onis Treaty of 1819, she was also the beneficiary of the 150-foot wide water strip from the Gulf to the 32nd parallel by virtue of the same treaty."

Louisiana's basic hypothesis is incorrect, and therefore its postulation is without merit. Louisiana received no title to or jurisdiction over any land north of the

[2]It is true that a former Texas Land Commissioner asserted such a claim in 1941, but this lasted only about as long as the assertion in the same year by Louisiana Governor Sam Jones of title to the west bank of the Sabine. In neither instance were their assertions adopted by their State Legislatures or pursued to litigation or occupancy against the other State.

Sabine River under the 1819 Treaty. On the contrary, by its own undisputed proof in Defendant's Exhibit G, Louisiana obtained title to the unsold Federal lands adjacent to the Texas eastern land boundary line by grants from the United States Government under the Swamp and Overflow Lands Act of March 2, 1849 (9 Stat. 352), after its jurisdiction over the area had been recognized and acquiesced in by the United States Government's resurvey of such line as the west line of Louisiana in 1846.

The map dated February 13, 1839, entitled "T12 N. R. 16 W Northwestern District Louisiana,"[3] reveals that in 1837 the surveyor for the U. S. General Land Office had thought the western land boundary of Louisiana intersected the Sabine considerably west of the line subsequently marked by the Joint Commission in 1841, and he had surveyed out the western sections of the public land townships accordingly. This same map shows the "Texian Line" as located in 1841 to bisect Sections 6, 7, 18, 19 and 30 of Township 12, leaving the major portions of each section on the Texas side of the line. As shown in Defendant's Exhibit G, George W. Morse was employed by the United States to resurvey this land boundary north of the Sabine and reduce these sections so that their west lines would connect with the 1841 boundary line. His 1846 map[4] shows the "Line of Demarkation" as the west line of the reduced fractional sections, which were subsequently conveyed to Louisiana with their west lines calling to coincide with the west line of the State.

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[3]Defendant's Exhibit G, numbered 237 in the upper right hand corner.

[4]Defendant's Exhibit G, numbered 238, entitled "T12N.R. 16W., N.W. District, La."

In this connection, an interesting aspect of the "Line of Demarkation" shown on the two maps above referred to is that a southern extension of the line as resurveyed in 1846 (only 5 years after the Joint Commission survey) strikes more nearly the center of the River than the west bank, the intersection being at a point where the River is shown to be turning northwest.

In any event, the land boundary line and Louisiana's ownership of the land adjacent thereto were not established by reason of the Treaty of 1819 but by the resurvey authorized by Congress in 1846 and the land grants to Louisiana made by Congress under the Act of March 2, 1849. Thus, as to any Federal lands along the boundary north of the Sabine, Congress dealt favorably with Louisiana through constitutional procedures just as it dealt favorably with Texas on the western half of the Sabine in 1848.

HISTORICAL BACKGROUND AND THE TREATIES

I.

THE HISTORICAL BACKGROUND ESTABLISHING LOUISIANA'S WESTERN BOUNDARY IN 1812, AND THE RELEVANT TREATIES DEMONSTRATE AS A MATTER OF LAW THAT LOUISIANA NEVER ACQUIRED ANY JURISDICTION OVER OR TITLE TO THE WESTERN HALF OF SABINE PASS, SABINE LAKE AND SABINE RIVER.

A. THE UNITED STATES ACQUIRED THE SABINE BY THE LOUISIANA PURCHASE IN 1803 AND HAD TITLE TO AND JURISDICTION OVER THE ENTIRE SABINE WHEN IT LIMITED LOUISIANA'S WESTERN BOUNDARY TO THE MIDDLE THEREOF IN 1811-1812.

Plaintiff has covered this point in its main brief, 13-15, but Louisiana raises certain questions about the validity and extent of the claim of the United States which should be answered. Not satisfied to accept the pronouncements of President Jefferson and subsequent Presidents and Secretaries of State that the purchase embraced all lands between the Mississippi River and the Rio Grande, including all of the Sabine and the Province of Texas, Louisiana files contrary views contained in a pamphlet published by a Minister of Mexico (Def. Ex. A, 98-119) and a nebulous historical sketch written by Frank Bond in 1933 (Def. Ex. A, 6). In further derogation of official U. S. claims, Louisiana asserts as to "Jefferson's imaginative horizons . . ." that the "realities were out of balance with the hopes, and the result was that the pretensions of the United States' leaders shrank . . . finally to the Sabine—by the time the Territory of Orleans was actually formed and Louisiana became a State" (La. Br., 20).

The foregoing assertions are historically incorrect. The Territory of Orleans was created in 1804; Louisiana became a State in 1812; and the Treaty with Spain was signed in 1819. During this entire period, President Jefferson, President Madison, President Monroe (acting earlier as Secretary of State) and Secretary of State John Quincy Adams asserted that the Louisiana Purchase extended to the Rio Grande.[5] Secretary of State James Buchanan later reviewed the history in a letter to John Slidell, U. S. Minister to Mexico, on November 10, 1845:

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[5] *A History of the Western Boundary of the Louisiana Purchase,* 1819-1841, by Thomas M. Marshall, 10-17, 50-63; *The Louisiana Purchase* by Binger Hermann, Commissioner of the General Land Office of the United States, House Document No. 708, 56th Cong., 1st Session, 1900, 48.

"It would be easy to establish by the authority of our most eminent statesmen—at a time, too, when the question of the boundary of the Province of Louisiana was better understood than it is at present,—that, to this extent at least, the del Norte (Rio Grande) was its western limit. Messrs Monroe and Pinckney, in their communication of January 28th, 1805, to Don Pedro Cevallos, then the Spanish Minister of Foreign Relations, assert, in the strongest terms, that 'the boundaries of that Province are the River Perdido, to the East; and the Rio Bravo to the West.' They say, 'the facts and principles which justify this conclusion are so satisfactory to our Government, as to convince it that the United States have not a better right to the Island of New Orleans, under the cession referred to, (that of Louisiana) than they have to the whole District of territory which is above described.' Mr. Jefferson was at that time President, and Mr. Madison Secretary of State; and you well know how to appreciate their authority. In the subsequent negotiation with Mr. Cevallos, Messrs. Monroe and Pinckney conclusively vindicated the right of the United States as far west as the Del Norte. Down to the very conclusion of the Florida Treaty, the United States asserted their right to this extent, not by words only, but by deeds.'"[8]

In his history, *The Louisiana Purchase,* Binger Hermann, Commissioner of the General Land Office of the United States, wrote:

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[8]Manning, *Diplomatic Correspondence of the United States,* VIII, 177. The same letter continues by relating that in 1818, President Monroe sent George Graham to Galveston to demand the removal of a group of French Napoleonic refugees who had established a colony (Champs D'Aisle) on the banks of the Trinity River, his instructions being to advise them that they were within the "territorial limits" of the United States. The Rio Grande is referred to at various times as the "Rio Bravo" and "Rio Grande del Norte." The Treaty of 1819 between Spain and the United States is often referred to as the "Florida Treaty."

> "Our nation always claimed, as did France, that the Louisiana Purchase extended westward to the Rio Bravo. . . . The United States on this ground claimed Texas up to 1819 and then abandoned it when Spain ceded to us the two Floridas . . . this view is corroborated by reference to President Monroe's message to Congress December 7, 1819, concerning the treaty with Spain in that year, wherein he says: 'For territory ceded by Spain other territory of great value (Texas) to which our claim was believed to be well founded was ceded by the United States, and in a quarter more interesting to her.' "[7]

It should be noted further that the Treaty of 1819 was not ratified until 1821, and during Spain's delay Secretary of State Adams wrote that if ratification was withheld, the United States would reassert "and never again relinquish" its right to a western boundary "at the Rio Grande del Norte."[8]

In spite of this history, Louisiana asserts that in the Enabling Act of 1811 and its Constitution of 1812 "the boundary between Louisiana and *the Spanish territories* is placed in the middle of the Sabine" (La. Br. 7) and again that "The Kingdom of Spain owned the adjacent territory" when Louisiana was admitted to the Union (La. Br. 32). Louisiana has overlooked the House debates on the Enabling Act of 1811, which it has filed in Defendant's Exhibit A, 39-65, much of which is devoted to assertion of the title of the United

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[7]Hermann, *The Louisiana Purchase,* see footnote 5, supra. The author also points out that 25 years later President Tyler, in announcing the negotiation of a treaty for the annexation of Texas in 1844, said "the Government will have succeeded in reclaiming a territory which formerly constituted a portion, as confidently believed, of its domain under treaty of cession of 1803 by France to the United States."

[8]*John Quincy Adams and the Foundation of American Foreign Policy* by Samuel Flagg Bemis, 1956, 351.

States as far west as the Rio Grande and the fear of the new State being left with an uncertain boundary on the west.

Section 2 of the bill then under consideration and as passed by the House on January 15, 1811, provided for no fixed boundary on the west, merely describing the area of the proposed State to be that "now contained within the limits of the Territory of Orleans, except that part lying east of the river Iberville and a line to be drawn along the middle of the lakes Maurepas and Pontchartrain to the ocean" (Def. Ex. A, 62). Mr. Poindexter, the bill's chief advocate in the House, contended as Defendant now argues, that the western line of the State could be settled later by treaty. He said:

> "It belongs exclusively to the high contracting parties, to render that certain, which by the deed of cession is equivocal, and whatever line they may consent to establish as the western extremity of the country ceded under the name of Louisiana will constitute the permanent limit of the State, whether it extends to Rio Bravo or the Sabine, or a meridian passing by Natchitoches" (Def. Ex. A, 57).

However, the Senate did not go along with any such uncertain western boundary for the State of Louisiana. It amended the bill to provide the definite and fixed western boundary provision which was finally enacted and is now before the Master in this case. Plaintiff is including the Senate proceedings in its Exhibit G filed herewith.

Finally, the Defendant, still insisting that "when Louisiana was admitted there was no state or territory west of her boundary," and "That the Kingdom of Spain owned the adjacent territory," adds a con-

cession; "though, we candidly admit that claims were being made by the United States to lands west of the Sabine" (Def. Br. 31-32). This admission, and the truth of it, settles the question as far as the courts of the United States are concerned. It is a well established rule that our courts will accept as valid the assertions of the political branch of the Government as to the extent of the territory of the United States. *Foster and Elam v. Neilson,* 2 Pet. 253; *Jones v. United States,* 137 U.S. 202, 221; *In re Cooper,* 143 U.S. 472; *Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 380-381; *United States v. California,* 332 U.S. 19, 33-34.

Thus, as a matter of history and law, at the time Louisiana was admitted to the Union in 1812, the United States was asserting its title to the territory westward to the Rio Grande, including all of the Sabine and the Province of Texas, and these assertions continued until the 1819 treaty was ratified in 1821.

This accounts for Congress fixing the western boundary of the State of Louisiana in the middle of the Sabine in the Enabling Act of 1811. As indicated above, the United States was then claiming a vast territory west of the Sabine which might become a State, and, as shown in Plaintiff's main brief, 20-22, it was the established policy of Congress to fix mid-stream boundaries between the states and territories so that any present or future states would be treated equally with respect to such common boundary streams. This is precisely what was done in the same Act with respect to the Mississippi and Iberville Rivers which lay between the new State of Louisiana and the Territory of Mississippi. In fact, in all of Louisiana's other navigable water boundaries, the State line is in the middle of the stream or lake by specific calls or by operation

of the law which existed at the time of its admission.[9]

B. LOUISIANA'S WESTERN BOUNDARY HAVING BEEN FIXED IN THE MIDDLE OF THE SABINE BY THE LOUISIANA CONSTITUTION AND ACTS OF CONGRESS, WHICH HAVE NOT BEEN AMENDED, THAT STATE DID NOT AND COULD NOT ACQUIRE ANY JURISDICTION OVER OR OWNERSHIP OF THE WESTERN HALF OF THE SABINE.

Louisiana makes no further denial that its western boundary was fixed and limited at the middle of the Sabine at the time of its admission in 1812. Plaintiff's main brief, 16-20, relates the precise manner in which this was done by use of the same descriptive wording in the Enabling Act of 1811, the Louisiana Constitution of 1812, and the Act of Admission of 1812. The relevant portions of all three of these documents are copied at pages 3-7 of the Appendix to Plaintiff's main brief.[10]

Notwithstanding these enactments and the fact that they have not been amended by Congress or the State of Louisiana, Defendant makes an argument that the Treaty of 1819, in which the United States ceded to Spain its territories west of the west bank of the Sabine, automatically resulted "in *coalescing* the western half of the Sabine with Louisiana." It cites no authority for this novel theory of enlargement of fixed water boundaries by "coalescence," and the nearest

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[9]*Louisiana v. Mississippi*, 202 U.S. 1 (1906); Douglas, *Boundaries, Areas, etc. of the United States and the Several States*, Geological Survey Bulletin 817, 1930, 166-169.

[10]The definite and controlling language in each of these documents reads: ". . . beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude . . .".

analogous recognized legal doctrine that we have found is that of "accretion," which obviously does not apply.

Even in a case where the ordinary rule of accretion would otherwise apply, the Supreme Court held in *New Mexico v. Texas,* 275 U. S. 279, 301-302 (1927), that the rule did not operate to move the river boundary that had been otherwise fixed in the middle of the Rio Grande by the Act of Congress admitting New Mexico as a State and by the Constitution of New Mexico adopted prior to its admission. This case is squarely in point, because it involved a river boundary between two States, and Texas was complaining of the Master's finding that the boundary had been moved eastward by accretion which occurred after the boundary had been fixed in the middle of the Rio Grande as it existed in 1850. In overruling this portion of the Master's Report, the Supreme Court said:

> "Both Sides have filed exceptions to the master's report in reference to accretions. Texas, on the one hand, insists that he was in error in reporting as the boundary line the location occupied by the river after it has been moved eastward from its location in 1850 by accretions. New Mexico, on the other hand, insists conditionally—that is, only if its exceptions as to the location in 1850 are not sustained—that in determining the accretions in the Country Club area the master fixed the line of such accretions in an indefinite manner and not far enough to the east. We find that the contention of Texas is well taken and the conditional contention of New Mexico is therefore immaterial.
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> "This case is not one calling for the application of the general rule established in *Nebraska v. Iowa,* 143 U.S. 359, *Missouri v. Nebraska,* 196 U.S. 23, *Arkansas v. Tennessee,* 246 U.S. 158, and *Oklahoma v. Texas,* 260 U.S. 606, as to changes in

State boundary lines caused by gradual accretions on a river boundary.

* * *

"New Mexico, when admitted as a State in 1912, explicitly declared in its Constitution that its boundary ran 'along said thirty-second parallel to the Rio Grande . . . as it existed on the ninth day of September, one thousand eight hundred and fifty, to the parallel of thirty-one degrees, forty-seven minutes north latitude.' This was confirmed by the United States by admitting New Mexico as a State with the line thus described as its boundary; and Texas has also affirmed the same by its pleadings in this cause. Since the Constitution defined its boundary by the channel of the river as existing in 1850, and Congress admitted it as a State with that boundary, New Mexico, manifestly, cannot now question this limitation of its boundary or assert a claim to any land east of the line thus limited." (301-302)[10a]

Texas submits that the foregoing case completely answers all of Louisiana's contentions that this Sabine boundary could have been changed to include the western half of the river by any method other than legislative action by Congress and by the State of Louisiana. The Defendant shows neither.

1. The Treaty of 1819 did not make or approve any change in the western boundary of Louisiana.

Louisiana bases its only theory of possible Congressional approval of an extension of its western Sabine boundary on the Treaty between the United States and Spain negotiated in 1819. This argument is untenable

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[10a]This opinion was modified in 276 U. S. 557 as to certain evidentiary statements made in the original opinion, but the holding remained the same. To the same effect is the holding in *United States v. Louisiana, et al.*, hereinafter quoted.

for two reasons: (1) the treaty does not mention the boundary of the State of Louisiana,[11] and (2) State boundaries cannot be changed by treaties.[12]

2. No State legislation was enacted by Louisiana changing its western boundary.

Louisiana bases its only claim of State legislative action amending the boundary provision of its constitution upon Resolution 212 adopted on March 16, 1848. This Resolution amounts only to an expression of intent to include within the State's boundary the western half of the Sabine "whenever the consent of the Congress of the United States can be procured thereto . . .". It was conditioned on Congressional approval which never occurred. Therefore, Resolution

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[11]This point is fully covered in our main brief, 23-29. Louisiana cites two isolated instances in 1828 in which President John Quincy Adams and Secretary of State Henry Clay refer to a Resolution of the House inquiring about the line between "the State of Louisiana and the Province of Texas" and asserts that for a decade after 1819 "American Statesmen uniformly referred to the boundary established by the Treaty of 1819" in this manner. This is contrary to the history of the extended negotiations between the United States and Mexico over the location of the line "between the two countries" and the plain language of the Treaty of Limits between the United States and the United Mexican States signed in 1828. See *A History of the Western Boundary of the Louisiana Purchase, 1819-1841* by Thomas M. Marshall, *supra,* 71-85, and copy of the Treaty of 1828 at p. 14 of Appendix to Plaintiff's main brief.

[12]The cases in support of this point and the rule that territory acquired by treaty cannot even become a part of the United States without action by the Congress are discussed in our main brief, pp. 29-33. On portions of the Rio Grande acquired by the United States by treaty with Mexico after Texas entered the Union, Acts of Congress and the Texas Legislature were necessary to bring the area within the jurisdiction of the State. Public Law 132, 1922 (42 Stat. 359), Chapter 101, General Laws of Texas, 1923, and the House Judiciary Committee Report covering this procedure are included in Plaintiff's Exhibit G.

212 never became effective for any purpose other than as a petition for Congressional action.

Actually, this Resolution[13] is the most conclusive evidence in this case against the factual and legal contentions which are being made by Louisiana. By reading the entire document, rather than excerpts taken out of context, it is evident that on March 16, 1848, the Legislature of Louisiana officially recognized that its constitution, laws and jurisdiction *did not* extend over that *"part of the United States,"* embraced within the western half of the Sabine. By this Resolution asking for the consent of Congress to permit Louisiana to extend its jurisdiction over that part of the territory of the United States, it recognized not only that its western line was still located in the middle of the River but also the necessity for Congressional approval before a change in that boundary could be effected.[14]

Congress denied the petition, evidently believing that it would be unfair to depart from its established policy of permitting each bordering state to have half of the navigable boundary streams. Instead, it granted the petition of the Texas Legislature and permitted that State to extend its boundaries to include the western half of Sabine Pass, Sabine Lake and Sabine River.

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[13]Appendix to Plaintiff's main brief, pp. 20-21; also filed at pp. 288-288A of Defendant's Exhibit A.

[14]In international law, this type of recognition of a territorial title would estop future claims to the contrary. Schwarzenberger, in "Title to Territory: Response to a Challenge," 51 Am. J. Int'l. Law (1957), 316, says: "However weak a title may be, and irrespective of any other criterion, recognition estops the state which has recognized the title from contesting its validity at any future time." In *Michigan v. Wisconsin,* 270 U.S. 295, the Supreme Court held that the principles of international law are applicable to boundaries between states. See also 49 Am. Jur. 239.

The above mentioned Resolution of the Louisiana Legislature and Acts of Congress constitute significant official interpretations of the effect of the Louisiana Boundary Acts of 1811-1812 and the fact that they were unaffected and unchanged by the Treaty of 1819.

3. Geographical contiguity did not effect an extension of Louisiana's western boundary.

Louisiana's final argument—that being the westernmost State after the Treaty of 1819 was ratified in 1821, it should have automatically inherited the western half of the Sabine—ignores the fact that there remained strong opposition to the treaty relinquishing Texas up to the date of its ratification,[15] and thereafter every American President and Secretary of State continuously sought to reacquire Texas by purchase or diplomacy until the Texas Annexation Agreement was accomplished in 1845.[16] There was a reason for Congress to retain the western half of the Sabine for a possible future state, and any other policy would have been an unfair precedent for each subsequent western state which was later added to the Union.[16a] For instance, in 1846 Texas was the most western state and bordered on the Rio Grande with a Spanish Territory which later became the Territory and State of New Mexico.

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[15]Much of the opposition came from Louisiana. Secretary of State Adams wrote that ratification in 1821 was opposed in a resolution introduced in the Louisiana Legislature and that Louisiana Governor T. B. Robertson "made an attack upon the treaty in his speech to the Legislature." *Memoirs of John Quincy Adams,* V, 285-86.

[16]See citations for this history in Plaintiff's main brief, 25-29; also *The American Secretaries of State and their Diplomacy* by Samuel Flagg Bemis, 1928, IV; and *United States v. Louisiana, et al.,* 363 U.S. 1, 39-40, footnote 73.

[16a]The reason and the policy were stated by the Supreme Court in *United States v. Holt Bank,* 270 U.S. 49, 55, as follows: ". . . the United States early adopted and constantly

Its western border was very properly and consistently fixed at the middle of the Rio Grande. *New Mexico v. Texas,* supra.

Louisiana's theory of automatic enlargement of its boundary after 1819 because of being then the most western state of the Union (La. Br., 7, 21, 27) is akin to the old rule of "contiguity" or "geographical propinquity" by which nations once acquired additional territory under international law. The doctrine was rejected in the 19th century "because it is wholly lacking in precision," and it was never applied to include areas outside of a fixed statutory boundary or "to the extent of invoking it to supersede a vested legal title" in another sovereign.[17] Obviously, the theory cannot apply on behalf of Louisiana against the United States under a Constitution which requires the approval of Congress before a State can change its boundary. In all of the cases cited by Defendant on this point, Congressional approval was held to be required.

The Supreme Court held squarely against Louisiana in *United States v. Louisiana, et al.,* 363 U. S. 1 (1960), when that State advanced the same argument with respect to its southern boundary being automatically extended to include any adjacent "tidelands" belt which was acquired by the United States under inter-

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has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

[17]*Digest of International Law* by Marjorie M. Whiteman, U.S. Department of State, 1963, II, 1046-1059.

national law after Louisiana's admission to the Union. The Court said:

> "It is sufficient for present purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter. Such a boundary, fully effective as between Nation and State, undoubtedly circumscribes the extent of navigable *inland* waters and underlying lands owned by the State under the Pollard rule." (35)
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> * * *
>
> "To the extent that Louisiana's reliance on post-admission events is for the purpose of showing that the United States established a three league 'National Boundary' in the Gulf, they cannot help her case, for reasons previously discussed. . . . Under the Submerged Lands Act, Louisiana's boundary must be measured at the time of her admission, unless a subsequent change was approved by Congress. If the Act of Admission fixed the boundary at the shore, neither action by Congress fixing greater boundaries for other States nor Executive policy on the extent of territorial waters could constitute Congressional approval of a maritime boundary for Louisiana . . ." (75-76)

II.

SINCE THE UNITED STATES HAD EXCLUSIVE TERRITORIAL JURISDICTION OVER THE WESTERN HALF OF THE SABINE ON JULY 5, 1848, THE ACT OF CONGRESS AUTHORIZING TEXAS TO EXTEND ITS EASTERN BOUNDARY TO INCLUDE THE AREA WAS VALID AND RESULTED IN TEXAS' PRESENT JURISDICTION AND OWNERSHIP.

Plaintiff has shown in Point I above that the United States acquired jurisdiction over and ownership of the western half of the Sabine in 1803; that it did not

make any cession thereof to the State of Louisiana or approve any change in that State's boundary so as to include such area; and that Louisiana did not acquire such jurisdiction in any other manner. Therefore, exclusive jurisdiction and ownership was in the United States when it passed the Act of July 5, 1848 (9 Stat. 245), consenting for Texas to extend its eastern boundary to include the area. There being no conflict with any right previously granted to or held by the State of Louisiana, the Act was valid in every respect and resulted in the jurisdiction and ownership held by Texas since 1849 and now asserted in this case. Full discussion of this point has been submitted in Plaintiff's main brief, 34-36.

MEANING OF THE MIDDLE OF THE RIVER

III.

THE THALWEG RULE IS INAPPLICABLE TO THIS CASE, AND THE BOUNDARY IN CONTROVERSY IS THE GEOGRAPHIC MIDDLE OF SABINE PASS, SABINE LAKE AND SABINE RIVER.

The history of, reasons for, and explicit exceptions to the thalweg rule clearly demonstrate its inapplicability to the Sabine boundary line between Texas and Louisiana. The original and more ancient rule calls for equal division of territory by use of a line equidistant from the river banks, and this is still the rule applicable to non-navigable rivers and to those navigable rivers in which a main channel is unknown or is not involved or alleged.[18] The only reason for a

[18] *Shore and Sea Boundaries*, by Aaron L. Shalowitz, Vol. II, 374, published in 1962 by the Coast and Geodetic Survey, U.S. Department of Commerce; *Georgia v. South Carolina*, 257 U.S. 516, 521 (1922); *Iowa v. Illinois*, 147 U.S. 1, 7-8 (1892).

change in the ancient rule was to assure the states bordering on a river equal use of the main channel of navigation. The Supreme Court stated in *Minnesota v. Wisconsin,* 252 U. S. 273, 282 (1920):

> "The doctrine of Thalweg, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary."

In *Iowa v. Illinois,* 147 U.S. 1, 7-8 (1892), the Supreme Court held the thalweg doctrine for boundaries between States is based entirely upon this equitable principle: "The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest." However, the opinion includes the following quotation from Creasy, *First Platform on International Law,* 222, which indicates that the ancient geographic line is the *prima facie* line until the existence of a different main channel is alleged and proven:

> "Formerly a line drawn along the middle of the water, the *medium filum aquae,* was regarded as the boundary line; and still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the *medium filum.* When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation."

In the same case, the Court made it clear that the thalweg rule will not apply if it has been otherwise

provided "by statute or usage of so great a length of time as to have acquired the force of law." This exception is also stated by the Court in *Arkansas v. Tennessee,* 246 U.S. 158, 170 (1918).

In *Georgia v. South Carolina,* 257 U.S. 516 (1922), the Supreme Court, then composed of eight of the same members who decided *Arkansas v. Tennessee,* supra, held that since equal rights of both States to navigation had been otherwise preserved, the reason for applying the thalweg doctrine was "out of the case." Therefore, the Court applied the more ancient general rule, deciding that the boundary line in the river was "midway between the banks of the stream."

Hence, we have the foregoing cases pointing out several exceptions to the applicability of the thalweg doctrine, three of which were specifically alleged in the Answer of the State of Texas to the Counterclaims of the State of Louisiana at pages 7-8. They will be presented in the following order:

A. THE ONLY BASIS FOR THE THALWEG RULE IS ABSENT IN THIS CASE, BECAUSE FREE AND COMMON USE OF THE ENTIRE RIVER FOR NAVIGATION WAS RESERVED TO THE ADJACENT TERRITORIES AND FUTURE STATES BY STATUTES AND TREATY.

In 1811, while the Territory of Orleans covered all lands from the Mississippi on the east to the Rio Grande on the west, Congress enacted a statute relating to the public lands in the Territories of Orleans and Louisiana, Section 12 of which provided:

> "Sec. 12. *And be it further enacted,* That all Navigable rivers and waters in the Territories

of Orleans and Louisiana, shall be, and forever remain, public highways.'"[19]

In 1812, while the United States was still asserting its title to all lands between the Mississippi and the Rio Grande, Congress provided in the Act of Admission of the State of Louisiana[20] the following:

> "Provided, That it shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said state as to the inhabitants of other states and territories of the United States, . . ."

Article 3 of the Treaty of 1819 between the United States and Spain contained the following provision:

> ". . . the use of the Waters and the navigation of the Sabine to the Sea, and of the said Rivers, Roxo and Arkansas, throughout the extent of the said Boundary, on their respective Banks, shall be common to the respective inhabitants of both Nations."[21]

Louisiana admits that under the above statutes and treaty the entire Sabine is free to uninterrupted navigation by the citizens of both States. It makes no allegation or argument that a boundary in the middle of a thalweg or a main channel of navigation is necessary

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[19]Act approved February 15, 1811, Appendix, Public Acts of Congress, 1811, 1296, 1302. A copy is in Plaintiff's Exhibit G.

[20]2 Stat. 701, April 8, 1812; printed at pages 5-7 of the Appendix to Plaintiff's Brief in Support of Motion for Judgment.

[21]8 Stat. 252, Treaty of 1819, proclaimed February 22, 1821. See Appendix, page 9, Plaintiff's Brief in Support of Motion for Judgment. This provision was carried forward in the Treaty with Mexico of 1828, 8 Stat. 372 (Plf. Br., App. 14).

to protect its rights of navigation. It is obvious that navigation is not an interest, much less the "paramount" or "controlling" interest so essential for the application of the thalweg doctrine.

Therefore, Texas submits that the Supreme Court's decision in *Georgia v. South Carolina,* supra, is controlling and that the boundary should be determined to be in the geographic middle of the Sabine bodies of water, equidistant from the banks and shores, which is the location that has been recognized and followed by Congress, Federal agencies, and agencies of both States for more than 100 years.

Louisiana's attempt to distinguish *Georgia v. South Carolina* from this case, solely on the basis that the protection of navigation in that case had been by "convention" rather than by statute, overlooks the controlling point in the *Georgia* case. The Court held that the controlling point was that the location of "the navigable channel is not involved" in the case, because both States were protected in their use of the channel regardless of where the boundary line was fixed. The method of their protection, whether by convention, statute, or a combination of both, was irrelevant and had no bearing on the conclusion reached. The Court said:

> "However, the general rule is that where a river, navigable or non-navigable, is the boundary between two States, and the navigable channel is not involved, in the absence of convention or controlling circumstances to the contrary, each takes to the middle of the stream (*Handly's Lessee v. Anthony,* 5 Wheat. 374, 379; Hall, International Law, 6th ed., 123; Creasy First Platform of International Law, § 231), . . .
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> * * *
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> "Obviously such a stream may be wide and deep and may contain the navigable channel of the

river, or it may be narrow and shallow and insignificant in comparison with the adjacent parts of the river. But such variety of conditions cannot affect the location of the boundary line in this case, because, by Article II of the Convention, equal and unrestricted right to navigate the boundary rivers is secured to the citizens of each State, irrespective of the location of the navigable channel with respect to the boundary line.

* * *

"Thus, Article II takes out of the case any influence which the Thalweg or Main Navigable Channel Doctrine (*Iowa v. Illinois,* 147 U.S. 1; *Arkansas v. Tennessee,* 246 U.S. 158, 169, 170, 171) might otherwise have had upon the interpretation to be placed on Article I, by which the location of the line must be determined, and leaves the uncomplicated case of a boundary stream between two States quite unaffected by other considerations.

"Thus again we have the case of a stream for a boundary between two States and with the precise location of the boundary line unaffected by the Thalweg Doctrine, or by other circumstances, and again the rule must be applied that the division line is midway between the banks of the stream,—here between the island bank on the one side and the South Carolina bank on the other,—its precise position to be determined when the water is at its ordinary stage" (521-522).

This was also the holding of the Supreme Court of Louisiana in the second case of *State v. Burton,* 31 So. 291 (1902), a copy of which is in Plaintiff's Exhibit C, 21-22. In the first case of *State v. Burton,* 29 So. 970 (1901), the Supreme Court of Louisiana had held that the middle of the Sabine was the boundary between Texas and Louisiana. A copy of this decision is in Plaintiff's Exhibit B, 86. In the second case, referring to the meaning of the "middle" of the Sabine, the syllabus written by the Court said:

" 'The thread' of a stream is the line midway between the banks at the ordinary stage of water, without regard to the channel or the lowest and deepest part of the stream."

B. THE UNITED STATES, AS COMMON SOURCE PROPRIETOR, PROVIDED BY STATUTE FOR A GEOGRAPHIC MIDDLE LINE IN THE SABINE

In using the words "thence by a line to be drawn along the middle of said river" in the Enabling Act for creation of the State of Louisiana, approved February 20, 1811, there was no reason for Congress to intend anything other than a line along the geographic middle of the Sabine, because five days earlier it had already provided free access for navigation of the entire river in its Territorial Lands Act of February 15, 1811, *supra.*

The only possible basis for interpreting the language to mean the middle of a thalweg or main channel of navigation was absent, and this was confirmed in the Act of Admission, approved April 8, 1812, which contained both the boundary language above quoted and a reiteration that these "navigable rivers and waters . . . shall be common highways, and for ever free, as well to the inhabitants of the said state as to the inhabitants of other states and the territories of the United States . . ."

This was the construction given to the Sabine River boundary language of the aforesaid statutes when Congress passed the Act of July 5, 1848 (9 Stat. 245) consenting for Texas to "extend her eastern boundary so as to include within her limits *one half* of Sabine Pass, *one half* of Sabine Lake, *also one half* of Sabine River . . ." (Emphasis supplied). Obviously, these are mathematical terms indicating geographic halves of

the river and have no relation to a thalweg or main channel of navigation. Such was the precise construction given to the Acts by the Senate Judiciary Committee Chairman, who reported:

> ". . . The boundary of the State of Louisiana extended to the middle of the Sabine; so that the half of the river and lake, to the western shore belonged to the United States, and was not included in the State of Louisiana. . . . The bill before the Senate gives the half of the river beyond the boundary of the State of Louisiana to the State of Texas . . ."[22]

Also, as shown by the many maps published by Federal agencies and filed in Plaintiff's Exhibits A, E and F, and the affidavits in Exhibit G, this has been the consistent construction of the Louisiana and Texas Boundary Acts by the executive departments of the United States. Each of the States adopted the language used by Congress in their respective enactments fixing the boundary in the middle of the Sabine, and their long interpretation of the line as a geographic center line rather than a thalweg line is evident from the numerous maps prepared by the agencies of both States and filed in Plaintiff's Exhibits A. and F.[23]

Finally, this construction was officially pronounced by the Attorney General of Louisiana as being applicable (in the event the west bank is not the boundary) in a Memorandum entitled "Louisiana-Texas Boundary Dispute" delivered at a conference between

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[22]Congressional Globe, 1st. Sess., 30th Cong., New Series No. 56 at p. 882; Appendix to Plaintiff's main brief, 23-24.

[23]Note particularly the map at page 7 of Plaintiff's Exhibit F of a 1930 centerline survey in Sabine Lake by J. C. McVea, on which Louisiana officials cooperated and endorsed their official approval. See Plaintiff's Exhibit C, 39, 41, for the official Report to the Governor of Louisiana on this work.

Louisiana and Texas officials on August 10, 1965, as follows:

> "The problem in following the rule in *Louisiana v. Mississippi,* supra, is that the thalweg does not and cannot apply in Sabine Pass, Sabine Lake and the Sabine River, for the boundary between Louisiana and Texas in those areas is either located in the center of the water bodies or on the west bank thereof, and there is no thalweg rule to apply and extend in waters off coast separating the two states."[24]

C. THERE WAS NO WELL-DEFINED OR HABITUALLY USED MAIN CHANNEL OF NAVIGATION IN SABINE PASS, SABINE LAKE OR SABINE RIVER IN 1812 OR THEREAFTER UNTIL MAN-MADE CHANNELS WERE DREDGED, AND DEFENDANT HAS FAILED TO ALLEGE OTHERWISE.

We take it from the quotations in *Iowa v. Illinois,* supra, that the burden is upon a state asserting the applicability of the thalweg doctrine to allege and show that there in fact exists a thalweg in which "vessels which navigate those parts keep their course habitually along some channel different from the *medium filum.*" This also seems evident in the other thalweg cases cited above and in Defendant's Reply Brief.

Louisiana has not alleged that in 1812, or at any subsequent date, there was a known thalweg or habitually used main channel of navigation different from the geographic middle of Sabine Pass, Sabine Lake or Sabine River. Texas alleged in its Reply to the Counterclaims of Louisiana (p. 8) that there was no such channel, and Louisiana failed to make any specific denial thereof in its brief. Defendant's only pleading

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[24] Item 16, Plaintiff's Exhibit C, 33, 36.

with reference to this issue is its alternative Counterclaim No. 3, page 7, of its Amended Answer and Counterclaims, in which it alleges that the boundary "is in the middle of the Sabine River, under accepted international law . . ." Its brief and exhibits contain no references to the physical conditions with respect to whether a thalweg was ever known to exist in the Sabine prior to the dredging of man-made channels.

Louisiana simply cites the cases which apply the thalweg doctrine for the purpose of protecting equal rights to navigable channels of the Mississippi and other major waterways without any allegations or showing that the Sabine presents the basic conditions necessary for the rule to apply even if navigation rights were involved in this case. Furthermore, Defendant does not contend that any evidence is necessary for the Master and the Court to decide as between the geographic and thalweg rules in this case.[25]

Islands

As far as we presently know, all natural islands in the Sabine waterways which existed in 1812 lie east of the approximate geographic centerline as shown on the U. S. Geological Survey topographic maps on file in this case. Only man-made islands and fingers of the shore are presently known to exist within the western half

[25]Although Texas does not believe the burden is upon it to show the non-existence of Thalweg channels, we are including in our Exhibit G affidavits and U.S. Corps of Engineers Reports negating the existence of such channels. As to Sabine Lake, they show it is a wide basin of shallow water with the same average depths across the Lake in all directions. See the 1838 Joint Commission Survey map of Sabine Lake in Defendant's Exhibit A and later soundings shown on pages 23-25 and 27 of Plaintiff's Exhibit A. In *Minnesota v. Wisconsin,* 252 U.S. 273, the Supreme Court applied the geographic middle rule to this type of water area in Lower St. Louis Bay (282-283).

of the Sabine. Accordingly, Texas is not apprised of any controversy over islands which would exist if the Master finds the boundary line to be approximately as shown on the latest topographic maps made by the Geological Survey in cooperation with the State of Louisiana. If this should result in an island controversy not now anticipated, either party could present the facts at the time the exact location of the boundary is to be surveyed. Plaintiff respectfully suggests that the Master reserve such matters for determination after the Supreme Court has passed upon his findings as to the basic issue of whether the boundary is on the west bank or in the geographic middle of the Sabine.

ACQUIESCENCE AND PRESCRIPTION

IV.

THE RECORD SHOWS UNDISPUTED EXERCISE BY TEXAS AND ITS PREDECESSOR IN TITLE, THE UNITED STATES, OF DOMINION AND JURISDICTION OVER THE WESTERN HALF OF THE SABINE FOR A PERIOD OF 157 YEARS, WITH ACQUIESCENCE BY THE STATE OF LOUISIANA SUFFICIENT TO ESTABLISH PRESCRIPTION AND ACQUIESCENCE AS A MATTER OF LAW.

GENERAL STATEMENT

Defendant contends that neither the United States nor Texas could perfect prescription in the western half of the Sabine because Louisiana enjoys the common right of navigation in the entire stream (Def. Br. 37-38). This argument is refuted by the Supreme Court decisions hereinafter cited, and it ignores the fact that a river is more than the overlying waters.

A river includes the bed, the air space above for bridges and transmission lines, and the sand, shell, gravel, and oil beneath the water, without which the adverse claim of Louisiana perhaps would not have been asserted. All of these are subject to the common rights of navigation possessed by others. However, the navigational servitude does not prevent a state from running prescription by exercising dominion and jurisdiction over the area.

Louisiana asks "how does one 'possess' a river" for the purpose of establishing prescription? (La. Br. 38) The State of Louisiana should know the answer after the manner in which it successfully prevailed upon the Supreme Court to apply the rule as to its water boundaries in *Louisiana v. Mississippi, supra,* which is a leading case on the subject. Therein, Louisiana made the same contentions and offered the same type of undisputed evidence that we have filed with the Master in this case, and Mississippi raised, and the Court rejected, the same type of legal obstacles that Louisiana now presents in this case. Other similarities will be reviewed later.

Louisiana urges that any acts and deeds performed by Texas subsequent to 1941, the year in which a Louisiana Governor wrote the first protest and asserted the first claim to a Texas Governor, are irrelevant and should not be considered by the Master. It cites no authority for this theory of tolling Plaintiff's period of prescription, and the cases negate it. The Supreme Court, in *Michigan v. Wisconsin,* 270 U.S. 295, 313, compares the prescription doctrine to the rule of adverse possession between individuals.[26] In the latter,

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[26]The particular principle applied by the Court in that case related to constructive possession and further answers Defendant's question as to how "possession" of a river may

the filing of a lawsuit or complete ouster is necessary to toll the prescriptive period. (2 C.J.S. 700-701.) The Court quoted from *Indiana v. Kentucky,* 136 U.S. 479, 509, in which it was significantly pointed out that for over seventy years Indiana "never asserted any claim by legal proceedings . . .". As in the *Indiana* case, the Court considered prescriptive acts which occurred up until the Complaint was filed, despite intervening assertions of adverse claims by officials of the other state.

Likewise, in *Louisiana v. Mississippi, supra,* where the Mississippi Governor and Legislature had asserted claims to oyster beds which almost led to armed conflict in the controverted area, the Court considered actions of the parties up until the Complaint was filed in 1902, pointing out that Mississippi "fails to satisfy us that she attempted any physical possession or control until after 1900" (57).

Because it is undisputed in this case that Louisiana filed no lawsuit and took no physical control amounting to ouster, Texas submits that all acts of prescription and acquiescence are relevant up until the date the Complaint was filed on December 12, 1969, which is a period of 157 years after the boundary of Louisiana was fixed in the middle of the Sabine in 1812. Even if Louisiana were correct in its contention to the contrary, there is an undisputed period of prescription

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be shown. The Court said: "The rule is well-settled in respect of individual claimants that actual possession of a part of a tract by one who claims the larger tract, under color of title describing it, extends his possession to the entire tract in the absence of actual adverse possession of some part of it by another. . . . Upon like grounds and with equal reason, under circumstances such as are here disclosed, the principle of the rule applies where states are the rival claimants. . . . In applying the rule, the area within the described boundary, both land and water, must be considered as together constituting a single tract of territory" (313-314).

and acquiescence for 129 years (1812 to 1941) without any protest from a Louisiana official, and this is longer than the period shown in any of the above cases.

Mr. Jacob H. Morrison, who drafted the letter for Louisiana Governor Sam Jones to send to the Governor of Texas on November 27, 1941, (Def. Br. 91-92) recognized that Louisiana might be barred by its long acquiescence in the claim of Texas to the west half of the River.[27] Later, on December 12, 1949, Governor Jones recognized this possibility in a letter to the Director of the Louisiana Department of Public Works, in which he said, *"Unless there has been acquiescence,* it is quite clear our title extends to the west bank because an Act of Congress cannot supersede a treaty."[28]

Plaintiff's argument on this point will be confined to the undisputed evidence now before the Master in the Exhibits filed by both parties. We contend that Defendant has not controverted the affidavits and documents filed in support of the Motion for Judgment in a manner that creates a material issue of fact. On the contrary, Louisiana has left undisputed every act of prescription and acquiescence necessary for a finding in favor of Texas on this issue, and it does not list any witnesses or argue that there is a necessity for hearing them before a finding is made by the Master.

Plaintiff relies on the above cited cases *Louisiana v. Mississippi, Michigan v. Wisconsin,* and *Indiana v.*

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[27]Plaintiff has obtained a copy of Mr. Morrison's first letter and brief on this subject addressed to Governor Jones on February 13, 1941, and they are being included in Plaintiff's Exhibit G. Mr. Morrison states in his 1941 brief, "It will probably be urged that by long silence and failure to protest, Louisiana has estopped herself to contest the boundary issue." Source: Louis Lenz Collection, University of Texas Archives, Austin, Texas.

[28]See copy at page 49 of Plaintiff's Exhibit C. Emphasis supplied.

Kentucky, in which the Supreme Court found, or approved a Master's finding, that the prevailing State had shown prescription and acquiescence on a river or navigable water boundary.

A. UNDISPUTED EXERCISE OF FEDERAL JURISDICTION AND LOUISIANA'S ACQUIESCENCE FROM 1812 TO 1849.

Plaintiff has covered this point in its main brief, 41-43, but Defendant counters that "no indicia of the federal prescence existed in the mud of the western Sabine" during the period from 1812 to 1849 (Df. Br. 41-42). The acts of dominion and sovereignty exercised by the United States and acquiesced in by Louisiana are detailed in Plaintiff's main brief, 13-29 and 33-34. They show that after Louisiana's admission in 1812, with its boundary fixed in the middle of the Sabine, the United States continued to exercise its exclusive jurisdiction and defended its sovereignty over the waters and land west of the Louisiana boundary until the Treaty of 1819 was ratified in 1821. Congress legislated for the area[29] and the executive branch negotiated continuously with Spain for its retention.

Any contention that the United States was not specifically concerned with the western half of the Sabine in 1819 is refuted by the fact that the final negotiations and last major disagreement between de Onis, on behalf of Spain, and John Quincy Adams, on behalf of the United States, concerned the exact area now in controversy. Don Luis de Onis insisted that the boundary between the two countries should be in the middle,

[29]Section 3 of the Louisiana Act of Admission in 1812 (2 Stat. 701) provided that "the residue of that portion of country which was comprehended within the territory of Orleans" together with the new State, shall comprise one district for judicial purposes.

and Adams took an adamant position that it should be the west bank of the Sabine and south bank of the Red River.[30] Bemis writes:

> "One-half of the width of the boundary rivers separated the two contestants for a continent."[31]

Adams prevailed, and after 1821 the United States continued to exercise exclusive jurisdiction over the west half of the Sabine and all of the Red River. As to the latter, Congress did not permit Texas to extend its boundary to the middle of that stream, and the United States still holds title to the south half of the Red River along the many miles where it flows between Texas and Oklahoma.[32] Continued exercise of dominion and sovereignty by the United States over the western half of the Sabine is evidenced in the subsequent negotiations and treaties with Mexico and the Republic of Texas, which led to the marking of the west bank in 1840-41 as the boundary between "the two countries" (8 Stat. 511). This exercise of continued sovereignty and exclusive jurisdiction finally culminated in the Act of July 5, 1848, in which Congress authorized the State of Texas to extend its eastern boundary so as to include the western half of the Sabine.[33]

Louisiana not only acquiesced in the aforesaid exercise of exclusive Federal jurisdiction over the western half of the Sabine by the inaction and silence spoken of in the cases cited above, but by the affirmative action of its legislature in Resolution 212, March 16, 1848, in which it acknowledged that the western half of the Sabine was "part of the United States" over which

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[30] *Memoirs of John Quincy Adams,* IV, 255.

[31] *John Quincy Adams and the Foundation of American Foreign Policy,* by Samuel Flagg Bemis, 1956, 333-334.

[32] *Oklahoma v. Texas,* 258 U.S. 574 (1922).

[33] 9 Stat. 245.

"the constitution and laws of the State of Louisiana, nor those of any other State or territory, extend . . .".[34]

B. UNDISPUTED RECOGNITION OF GEOGRAPHIC MIDDLE BOUNDARY LINE BETWEEN TEXAS AND LOUISIANA BY CONGRESS AND FEDERAL AGENCIES SINCE 1849.

All of the above cited cases give great weight to recognition of a disputed boundary line by the Congress and Federal agencies in cases involving prescription and acquiescence. In *Louisiana v. Mississippi, supra,* the Court cited various surveys, maps and reports of Federal agencies showing the boundary contended for by the prevailing party in that case, saying that such matters "may properly be referred to as showing the general understanding of and acquiescence in the boundary . . ." (55).

In this case, Texas' prescription began with an Act of Congress in 1848 specifically authorizing it to include the western half of the Sabine within its boundaries, and continued with Congress enacting at least 109 items of additional legislation between 1852 and 1969 recognizing that such area is within the State of Texas. Plaintiff has listed 103 separate appropriations or authorizations in River and Harbor Acts passed by Congress relating to Sabine River improvements, in

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[34]See Plaintiff's main brief, Appendix, 20-21. Louisiana later admitted that "The United States enjoyed undisputed and general jurisdiction over the remaining western half . . . from the date of the treaty with Spain, February 22, 1819, to July 5, 1848 . . ." in its brief filed before the U. S. General Land Office in a dispute with Texas involving islands in the Sabine. (Plf. Br. 28.) Defendant is mistaken in its assertion (Def. Br. 56) that a copy of this brief was not on file with the Master. The entire brief was filed in Plaintiff's Exhibit B, 9-34.

which Texas is specifically mentioned as the State within which all or a portion of such projects are located.[35]

Plaintiff has filed with the Master a total of 54 maps prepared by Federal agencies, some of them made in cooperation with the State of Louisiana, which show the geographic middle of the Sabine to be the boundary between Texas and Louisiana.[36] Defendant's chief reply to these is that the cartographers perhaps merely assumed that the geographic middle was the correct line and that they were not intended to fix boundaries. The Supreme Court rejected Mississippi's similar contention in *Louisiana v. Mississippi, supra,* and followed the argument advanced by Louisiana in that case that it was not a question of "fixing" but one of recognizing and portraying the location of boundaries theretofore established by Congress and the State. That is our position in the present case.[37]

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[35]Plf.'s Ex. B, 35-39 and Ex. E, 19-23. In Exhibit E, 1-2, 5-18, Plaintiff has listed six other Acts in which Congress gives similar recognition with respect to bridges across the Sabine, and one Act in 1906 creating "an additional (customs) collection district in the State of Texas . . . to comprise all of that portion of Texas . . ." specifically described as being bounded on the east by the center of Sabine Pass and Sabine Lake (Plf. Ex. E, 3-4).

[36]U.S. General Land Office maps, 1896, 1916, 1930, Ex. A, 1 and Ex. F, 1-2; U. S. Geological Survey maps, 1922, 1931, 1932-35, 1944, 1954-60, 1960-69, Ex. A 2-20, 26-45, 48; U. S. Department of Agriculture map, 1913, Ex. F 4; U. S. Corps of Engineers maps, 1947-67, Ex. A 21-25, Ex. C 71, 74-76, 82, and Ex. F 34, 36.

[37]In further reply, Texas is filing herewith in its Exhibit G an affidavit from Robert H. Lyddan, Chief Topographic Engineer of the U. S. Geological Survey, showing that the boundary line between Texas and Louisiana through the Sabine, as portrayed on Geological Survey maps, "is based on statutes quoted and information contained in U. S. Geological Survey Bulletin 1212 'Boundaries of the United States and the Several States' . . ."; that the line is "positioned one-half way between the stream banks as determined from aerial photographs. . . ."

Also, Plaintiff has filed letters from the U. S. General Land Office in 1903 and 1932 recognizing the boundary as claimed by Texas.[38] Thus, the recognition of this boundary between Texas and Louisiana by Congress and the Federal agencies has been continuous from 1849 to the present time, a period of more than 120 years, and Defendant offers no affidavits or exhibits to the contrary.[39] This covers a longer period than that involved in any of the cases cited above, and the number of Federal agency maps and recognitions by Congress and Federal agencies appears to be far more than those indicated in any of the previous Supreme Court cases in which the rule of prescription and acquiescence was applied.

C. UNDISPUTED EXERCISE OF DOMINION AND JURISDICTION BY TEXAS SINCE 1849.

There is present and undisputed in this record on Motion for Judgment every act of affirmative action required in any of the above cited cases to run prescription as to water or submerged lands. In addition to the great weight given in those cases to Federal recognition and maps, they stress (1) necessity for public notice of the boundary claimed, (2) extension of state and local "political and police control and jurisdiction over the disputed area," (3) grants of adjacent or filled land to or from the state, (4) collection of taxes, and (5) a continuous claim and exercise of jurisdiction uninterrupted by lawsuit or ouster by the opposing state.

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[38]Plaintiff's Exhibit B, 43-49.

[39]Curiously enough, the only map prepared by a Federal Agency dated after 1849 filed herein by Defendant is a U. S. General Land Office Map of 1879, which shows the boundary-shaded line *east* of the Sabine, or at least *east* of Sabine Lake.

(1) and (2) above are shown by the Act of Congress of 1848 and the Act of the Texas Legislature of 1849, the latter extending not only the State boundary to include the western half of the Sabine, but also the boundaries and jurisdiction of each county adjacent to the Sabine. Ever since 1849, Louisiana has had notice of the jurisdiction asserted by Texas. In addition, the cities of Port Arthur and Orange have extended their city limits and therefore their "political and police" jurisdiction to the geographic center of the Sabine since 1911 and 1914, respectively.[40]

In addition, Plaintiff has filed affidavits of State officials showing that State police jurisdiction has been continuously exercised over the area as required in (5) above.[41] These law enforcement officers swear positively that the game and fish laws, traffic laws and criminal laws have been continuously enforced by their departments since at least 1929, and that their counterparts in Louisiana have enforced Louisiana laws only to the center line of the Sabine.[41a] Louisiana has not filed any affidavit or document disputing these facts. The assertion in the Louisiana brief, p. 60, that "The record leaves no doubt that law enforcement agencies of both states patrolled all over the Sabine and neither confined itself to the middle thereof . . ."

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[40]Affidavits of Robert A. Bowers, City Engineer of Port Arthur, Plf. Ex. A 46-47; Ex. B 69-71A; and Ex. E 68-92; and Affidavit of F. E. Force, Tax Assessor-Collector of Orange, Ex. E 50-64.

[41]Affidavit of Robert L. Cross, Law Enforcement Coordinator, Texas Parks and Wildlife Department, Appendix to Plaintiff's main brief, 25-34; Affidavit of Captain C. L. Russell, Texas State Highway Patrol, Ex. E 150-151; Affidavit of Jerry Sadler, Commissioner of the Texas General Land Office (Plf. Br., App. 34-40).

[41a]Louisiana law enforcement officers were directed by the Supreme Court of Louisiana to respect this line in the *State v. Burton* cases, *supra,* in 1901 and 1902.

is no substitute for sworn evidence and is a complete misstatement of what the record plainly shows in the affidavits of Cross and Russell.

As to requirement (3) above, the record shows that numerous grants have been made by Texas in the western half of Sabine Lake since 1930. The first was to H. L. McKee for the purpose of building a proposed toll bridge across the Lake to the Louisiana shore, and it extended to the geographic center of the Lake.[42] The affidavits show there was no protest from Louisiana against any of these grants or to the reclaiming of the 3000 acre Pleasure Island and the extensive improvements built thereon by the City of Port Arthur, County of Jefferson, State of Texas and the United States Government.[43] It is also undisputed that from 1950 to 1969 Texas granted 78 oil and gas leases on behalf of its Permanent School Fund covering submerged lands within the western half of the Sabine, on four of which there are now producing oil wells,[44] and that from 1938 to 1970 Texas granted 32 shell, sand and gravel dredging permits on the western half of the Sabine (Plf. Ex. E 155-196).

As to collection of taxes, (4) above, Texas has filed an affidavit showing that it has collected taxes on that portion of railroad bridges and oil pipelines lying west

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[42]This is the same tract that was surveyed by J. C. McVea in 1930, with Louisiana officials cooperating and approving the centerline boundary in the middle of Sabine Lake. (See map 7, Plf. Ex. F, and details of Louisiana participation in Plf. Ex. C 38-41.) Subsequent grants to the United States Government in 1933 for U. S. Corps of Engineers' headquarters and to the City of Port Arthur in 1934, 1937, 1955 and 1967 are shown in Ex. E 77-85 and on map 46 of Ex. A.

[43]Plf. Ex. B 69-71 and Ex. E 68-92.

[44]Affidavit of Jerry Sadler, Commissioner of the General Land Office (Plf. Br. App. 34-40).

of the geographic center of the Sabine, since 1905 as to railroads and since 1933 as to oil pipelines.[45] From the mouth of the Sabine to Logansport (near the 32nd parallel), there are four railroad bridges, at least 22 oil and gas pipelines, and 3 electric power transmission lines which cross the Sabine. In Plaintiff's Exhibit B, 29-47, there are affidavits from the tax officers of the railroad and utility companies showing that they are assessed and pay taxes to Texas and its counties to the approximate geographic center line of the Sabine, and that Louisiana assesses and collects only on the portions lying east of such line. Some have attached maps which were displayed to both Texas and Louisiana tax officials in determining their total mileage taxable in each state, and these maps show the geographic center as the boundary.

Louisiana filed no affidavit disputing these facts. It resorts only to a statement in its brief, p. 62, that ". . . Louisiana taxing officials, if informed of such action at all, simply allowed the matter to take its course . . .". The above mentioned affiants swear that the tax officials of Louisiana not only were informed but accepted such centerline for determining the mileage to be taxed by Louisiana. In further reply to Defendant's casual treatment of this, one of the most conclusive evidences of prescription and acquiescence, Plaintiff is filing herewith in its Exhibit G affidavits from 12 pipeline companies showing that they too have met with Louisiana tax officials and that the approximate geographic center line of the Sabine has been accepted by the officials of both States for taxing purposes for many

[45]Affidavit of Earl Rossell, Intangibles Tax Assessor, Texas State Comptroller's Office (Plf. Ex. E 27-28). See also affidavits from city and county tax collectors, Plf. Ex. B 76-83, and Ex. E 48-67.

years, and that they pay taxes to Texas west of the center line and to Louisiana east of such line.

As summarized above, the many affirmative acts of dominion and jurisdiction exercised by Texas over the area in controversy since 1849 satisfy every requirement of proof held by the Supreme Court to be essential for prescription to apply to a water boundary, and they are not disputed by any affidavit or document filed herein by Defendant.

D. UNDISPUTED ACQUIESCENCE BY LOUISIANA SINCE 1849.

The cases cited above, as well as many other Supreme Court cases, indicate that acquiescence can be shown by long continued silence and failure to protest during the period when the opposing state was openly exercising acts of dominion and jurisdiction. Assertions of claims by an Indiana Governor and legislative commission were not allowed to absolve Indiana's neglect to institute legal proceedings in *Indiana v. Kentucky, supra.* In holding for Kentucky, the Court said:

> "It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. . . .
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> * * *
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> "Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to overcome, except by the clearest and most unquestioned proof."

In *Michigan v. Wisconsin, supra,* which involved the water boundaries between the two states and islands within such waters, Michigan had adopted a new con-

stitution in 1908, in which its revised boundary in the Montreal River conflicted with the boundary line of Wisconsin as described in its Enabling Act of 1846, and to which line the Court found Wisconsin had continuously exercised its dominion and sovereignty. The Court said that for more than 60 years Michigan "stood by without objection" and "without protest." The Court said:

> "Indeed, nothing appears to indicate dissatisfaction with the boundary thus established until the adoption of the Constitution of 1908, and, even then, except to the extent that this may be regarded as a continuing assertion of a claim to the boundary as there set forth or as originally described in the Michigan Enabling Act, the matter was allowed to rest until 1919.
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> * * *
>
> "Notwithstanding, the State of Michigan at this late day insists that the boundary now be established by a decree of this court in accordance with the description contained in her Constitution of 1908. Plainly, this cannot be done. That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, . . . and, *a fortiori,* to the quasi-sovereign states of the Union. The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority."

In the above cases and in *Louisiana v. Mississippi, supra,* the only evidence of affirmative acts of acquiescence on the part of the losing state were (1) knowledge and use of Federal agency maps showing the line as claimed by the prevailing state, and (2) maps pre-

pared by agencies of the losing state showing the line as claimed by the prevailing state. These acts are undisputedly attributable to Louisiana in this case, as are complete silence, inaction, failure to object or even protest, until Governor Jones' letter was written in 1941. This was 92 years after Texas began its long-continued exercise of dominion and jurisdiction.

As heretofore stated, Texas has filed 54 maps by Federal agencies showing the geographic middle of the Sabine to be the boundary line. As emphasized by the Court in *Michigan v. Wisconsin, supra,* these maps were "published and available to the public." In fact, 34 of these maps were made from 1932 to 1936 and 1954 to 1960 by the U. S. Geological Survey under contract with and in cooperation with the State of Louisiana, and they were publicly distributed by agencies of that State.[46]

In addition, we have filed with the Master, copies of 37 maps prepared by Louisiana State agencies, all of which show the boundary in the geographic middle of the Sabine,[47] and plans and maps for 7 bridges

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[46]Plaintiff's Exhibit A 3-15, 21, 23-30, 32-38, and 40-45. Copies of the 1932 and 1940 contracts are being filed in Plaintiff's Exhibit G. They specifically call for "political boundaries" to be shown, and Exhibit E 39-41 and 87-88 show that the Louisiana Department of Public Works was quite active in the mapping project and furnished much of the basic data. Affidavit of Robert H. Lyddan, Chief Topographic Engineer, U. S. Geological Survey, states: "To the best of my knowledge the U. S. Geological Survey has not received any objections from either the State of Louisiana or the State of Texas to the manner in which these topographic maps position the boundary line. . . ." (Plf. Ex. G filed herewith, pp. 16-17.)

[47]These include 1907, 1913 and 1925 maps published by the Louisiana State Board of Agriculture and Immigration, Exhibit F 2, 3, 5; the first Official State Map of Louisiana by the Louisiana Department of Public Works in 1937, as authorized by the Louisiana Legislature in 1928, Exhibit

jointly constructed from 1927 to 1963 by the Louisiana and Texas State Highway Departments and paid for equally by each State."[48]

That would be all the recognition and acquiescence necessary under the three cases above cited, but there is much more in this case. In fact, a study of all of the Supreme Court decisions on acquiescence in boundary suits between states indicates none in which there was present as many undisputed affirmative acts of acquiescence as are present in this case. Other affirmative actions are enumerated in Plaintiff's main brief, 43-49, and in our subsequently filed Exhibit C, which contains an index and summary of 45 documents to which we respectfully refer the Master in order not to further lengthen this reply brief. They include the Acts creating the Louisiana parishes (counties) along the Sabine;[49] Acts of the Louisiana Legislature in 1955 and 1956 authorizing Cameron Parish, Louisiana to erect a bridge from the east to a point in Sabine Lake where it will meet a bridge to be constructed "from the Jefferson County, Texas, side of such

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F 8 (see Act in Exhibit C 37 and details of 9 years' work on this map in Exhibit C 42-46); 21 official Louisiana Highway Department maps of State and Parishes from 1930 to 1970, Exhibit F 9-29; and 9 Louisiana Department of Conservation maps, 1958 to 1967, Exhibit F 36a and Exhibit C 54-70.

[48]Plaintiff's Exhibit F 38-65. See affidavit of Farland Bundy, Bridge Field Engineer, Texas Highway Department, for history, contracts, and pictures showing "State Line" signs erected jointly on bridge at point above centerline of River on U.S. Highway 10, Exhibit E 93-142.

[49]Plaintiff's Exhibit C 5-13. All parish boundaries enacted after 1849 either call for the *east* bank of the Sabine or the middle. The only earlier boundary (Sabine in 1843) which called for the west bank was abandoned. See summary of this and other parish boundaries in Index to Plaintiff's Exhibit C, page 2, and subsequent maps of Sabine Parish in Exhibit F 13, 14, 22, 23, 36a and Exhibit C 89-90.

stream. . . .'"[50] At pages 21-23 of Exhibit C is the opinion by the Supreme Court of Louisiana in the second case of *State v. Burton, supra* (1902), holding that the geographic middle of the Sabine is the western boundary of Louisiana and a Louisiana Attorney General's Opinion (1939) to the same effect.

Plaintiff's Exhibit D contains all oil and gas leases executed by Louisiana on any portion of the Sabine. They date from 1922 to 1969. Attached to these 36 leases are 24 plats or metes and bounds descriptions showing that the boundary between Texas and Louisiana is in the geographic middle of the Sabine. These leases, some of which were signed by the Governor, constitute further recognition and acquiescence in the line claimed by Plaintiff. As pointed out in our summary of these leases (Exhibit D, Index, 1-3), four of the riverbed leases contain self-serving "non-prejudice" provisions, and nine cover all interest "belonging to" or "owned by" Louisiana in the entire Sabine River or Pass. Defendant has filed an affidavit by Mr. Ory G. Poret, Deputy Register of the Louisiana State Land Office, (Def. Br. 82-89) in which he places a different interpretation on the extent of 16 of these leases, and yet his affidavit clearly states that the area of each is within a named parish of the State. As shown above, the boundaries of none of the parishes extend beyond the middle of the Sabine. For instance the description in Lease No. 376 to Tom C. Igoe, April 21, 1938, which he interprets as extending to the west side of the Sabine calls for "That part of the Sabine River owned by Louisiana . . . all in DeSoto Parish," and this is the same lease referred to in the above mentioned

[50]Act 52, 1955, and Act 65, 1956 (Plf. Ex. C 125-128). See copy of contract under which this bridge was constructed by Jefferson County, Texas, and Cameron Parish, Louisiana (Plf. Ex. B 72-75) and photograph (Ex. E 109).

Louisiana Attorney General's opinion holding that Mr. Igoe's lease "would not go farther westward than a line drawn along the middle of the river."[51]

Plaintiff's summary of these lease descriptions (Plf. Ex. D, Index 1-3) and the leases themselves dispute Mr. Poret's interpretations, but even if every word and interpretation of his affidavit were accepted as true and correct, they fail to show that any lessee took possession, drilled a well, or produced any oil, or otherwise ousted Texas from its dominion and jurisdiction over any of the area west of the centerline boundary, and they fail to absolve Louisiana of its acquiescence in this boundary for more than 121 years before the first questionable lease description listed by Mr. Poret was ever written.

The same is true of the eight right-of-way easements listed in the Poret affidavit and copied in Defendant's Exhibit E, 80-107. Curiously enough, the first of these was to H. L. McKee in 1929 to connect with his grant from Texas to the centerline of Sabine Lake, which line was surveyed in 1930 with the cooperation and written approval of Louisiana officials (Plf. Ex. F 7), and all the remainder have maps attached which clearly show the boundary line in the Sabine as claimed by Texas. All are signed by the Governor of Louisiana and the Register of the General Land Office, and Easement No. 431 is signed by Mr. Ory G. Poret as Deputy Register. In addition, Plaintiff will file herewith in its Exhibit G, nine Louisiana pipeline easements (dated from 1950 to 1966) which were omitted from

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[51]Opinion of the Attorney General of Louisiana, January 24, 1939 (Plf. Ex. C 23). For the list of Texas leases covering the western half of the Sabine, under which lessees have possession and four producing oil wells, see affidavit of Commissioner of the General Land Office of Texas (Plf. Br., App. 34-40).

Louisiana's Exhibit E. These also are signed by the Louisiana Governor and Register of the General Land Office, and all have maps attached which show the state boundary line as claimed by Texas.

Defendant's affidavit by Dr. Lyle S. St. Amant, Director of the Louisiana Wild Life and Fisheries Commission (Def. Br. 76, 81), stating that he "has always considered the boundary to be on the west bank of the Sabine Pass, Lake, and River" is not only irrelevant, but is also incomprehensible. He does not dispute the facts related in the affidavit of Robert L. Cross, Law Enforcement Coordinator for the Texas Parks and Wildlife Department (Plf. Br., App. 25-34), that since 1929 the Texas officers "enforced the laws relating to game and fish on the west one-half of the Sabine River, Sabine Lake and Sabine Pass" and "Louisiana officials enforced their game and fish laws only on the eastern half . . . and always respected our jurisdiction on the western half of these streams." Neither does he dispute the Louisiana Legislature's Resolution 211 of 1967 and Act of 1968 relating to boundary waters between Louisiana and Texas or the agreements thereby authorized and entered into between his Department and the Texas Department to provide for reciprocal licenses and uniform regulations on each side of the boundary line.[52]

Furthermore, Dr. St. Amant's interpretation that his Commission's shell leases in Sabine Lake covered the entire body of water is misleading. He fails to explain a long established general policy of his department to use descriptions on State boundary streams

[52]Plaintiff's Exhibit C 15-18 and Exhibit B 57-68. See also official *Shrimp Regulations* issued by the Louisiana Commission in 1968 and attached map which shows the State boundary in the middle of Sabine Lake. (Plf. Ex. G.)

which on the face of the leases cover the entire streams between certain points, leaving it to the lessee to keep his operations within the Louisiana boundary lines. Defendant will not deny the use of this policy. It is shown by correspondence and samples of leases on the Mississippi and Pearl Rivers between Louisiana and Mississippi filed herewith in Plaintiff's Exhibit G. That the shell leases listed by Dr. St. Amant in his affidavit actually applied only to the eastern half of Sabine Lake is further shown by Map 5, following page 15 of an official report entitled "The History and Regulation of the Shell Dredging Industry in Louisiana Compiled by the Louisiana Wild Life and Fisheries Commisison,"[55] published by the Louisiana Commission in 1968.

In any event, the Louisiana shell leases themselves provide that the lessees shall file with the Commission maps and monthly reports showing the area in which operations are conducted. If any dredging location or report had been west of the centerline of Sabine Lake, it is assumed that it would have been filed in contradiction to the undisputed affidavit of Robert L. Cross that the Texas Department has issued shell dredging permits on the western half of Sabine Lake and that "thousands of tons of shell have been dredged . . . under these permits, with compensation therefor being paid to the State of Texas" and that Louisiana officials "confined their similar activities east of the center of the streams" (Plf. Br., App. 25, 27-28). Copies of the Texas shell dredging permits on the western half of Sabine Lake from 1930 to 1966 are shown in Plaintiff's Exhibit E, 155-195.

All of Defendant's other affidavits are directed at explaining the intent of certain maps and acts of

[55]See copy in Plaintiff's Exhibit G.

acquiescence by Louisiana State agencies, and like the Poret and St. Amant affidavits, if every word of them is taken as true and correct, they do not dispute any of Plaintiff's prescriptive acts of dominion and jurisdiction or negate the acquiescence of Louisiana in the boundary claimed by Texas. The affidavits by Hatley N. Harrison, Jr., of the Department of Public Works, Richard K. Yancey of the Wild Life and Fisheries Commission, and A. D. Jackson of the Department of Highways, merely say that certain maps made by their agencies and agreements between them and the State of Texas were "not intended to *establish* any legal boundary between the State of Texas and the State of Louisiana." (Emphasis added.) Plaintiff agrees. It has not been alleged that these maps and agreements were intended to *establish* the boundary. What we contend is that they speak for themselves as acts of recognition and acquiescence in a boundary line which had been established by Congress and the State of Louisiana in 1812. At least they were official acts of acceptance, use and recognition of the line to which the United States (from 1812 to 1849) and Texas (from 1849 to date) exercised dominion and jurisdiction without protest from any Louisiana official until 1941.

SUMMARY OF ACQUIESCENCE

The boundary line between Louisiana and Texas in the geographic middle of the Sabine was born and nurtured in acquiescence by the State of Louisiana. It was accepted by that State and written into its constitution in 1812, an action which has never been changed or amended. When the Act of 1848 consenting for Texas to extend its boundary was before the United States Senate, the record reflects that, "Mr. Johnson of La., and Mr. Downs in behalf of Louisiana, expressed their acquiescence in the arrangement" (Plf.

Br., App. 23-24). This acquiescence by Louisiana officials continued without the slightest objection until 1941, was soon resumed, and never resulted in Louisiana filing legal proceedings or ousting Texas from its possession and jurisdiction.

The following language from the Court's opinion in *Louisiana v. Mississippi, supra,* is applicable here:

> "The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive. . . ." (at page 53).

That this prescription and acquiescence to the geographic middle prevails over any claim Louisiana may assert to a thalweg middle is shown in the Supreme Court's decision in *Arkansas v. Tennessee,* 310 U.S. 563.

As revealed by the record in this case, the two states have done quite well in living with this boundary midway between the banks of the Sabine for the past 121 years. Their cooperative efforts on bridges, law enforcement, and water development have not been retarded by a boundary line which divides the Sabine equally between them. It has served as a bridge rather than a barrier. This fact was recognized by Former Louisiana Governor Ruffin G. Pleasant in 1927, when he said in a speech at the dedication of the first bridge constructed jointly by the two states:

> "This beautiful bridge, reaching across the Sabine River, and half in Louisiana and half in Texas, is a symbolical handclasp of eternal friendship."[54]

After all of these years of friendly recognition and use of the "half and half" line by both states, it would

[54]Plaintiff's Exhibit E 99.

result in great injustice and inequity for Louisiana to be awarded the entire stream even if that State had some ancient and hitherto unlitigated basis for the claim, which we deny. The doctrine of acquiescence is an equitable rule which was evolved to protect ancient and long-recognized boundaries. In this case the long-recognized boundary is both the legal and the equitable boundary, while the west bank boundary claimed at this late date by Louisiana would be unfair and inequitable to Texas and its local units of government, which have expended great sums in reclaiming and improving much of the land in controversy.

CONCLUSION

The statutes, treaties, undisputed affidavits and exhibits filed by the parties in support of and in opposition to the Motion for Judgment show that no material fact issue exists and that the Special Master should find and recommend that the Supreme Court decree that the boundary between Texas and Louisiana is in the geographic middle of Sabine Pass, Sabine Lake and Sabine River, such line to be measured at points midway between the east and west banks when the water is at its ordinary stage.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney
General of Texas

HOUGHTON BROWNLEE, JR.
J. ARTHUR SANDLIN

JAMES H. QUICK
Assistant Attorneys General
of Texas

PRICE DANIEL
Special Assistant Attorney
General of Texas

DECEMBER, 1970

CERTIFICATE

I, Crawford C. Martin, Attorney General of Texas, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the ____day of December, 1970, I served copies of the foregoing Plaintiff's Reply Brief by first class mail, postage prepaid, to the office of the Governor and Attorney General respectively, of the State of Louisiana.

CRAWFORD C. MARTIN
Attorney General of Texas